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Ten Years Later, the Rwanda Tribunal still Faces Legal Complexities: Some Comments on the Vagueness of the Indictment, Complicity in Genocide, and the Nexus Requirement for War Crimes

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Abstract

2004 marks the tenth anniversary of both the start of the genocide in Rwanda and the establishment of the ICTR by the UN Security Council. In the past decade the ICTR has operated slowly but progressively, and it has delivered some insightful case law. Legal issues continue to arise, however, in the practice of the ICTR. This article considers some of these issues, namely the vagueness of the indictment, complicity in genocide, and the nexus requirement for war crimes. The overview shows that in various instances the ICTR has relied on pivotal case law of the ICTY. Moreover, it is demonstrated that, on occasion, the case law of the ICTR has been somewhat inconsistent. Nevertheless, the ICTR's case law is a next step in the building of a sound international criminal law system, and there will certainly be more opportunities for the ICTR to contribute. These contributions will only be worthwhile, however, if the ICTR's output continues to be of high quality.

Key words

complicity in genocide; International Criminal Tribunal for Rwanda; nexus requirement for war crimes; vagueness of indictment

As it reaches its tenth anniversary, the International Criminal Tribunal for Rwanda (ICTR) seems to be speeding up its pace. In the past decade one of the continuous criticisms of the ICTR's functioning has been its slow delivery of justice. True, the ICTR, established by the UN Security Council on 8 November 1994, had a difficult start.¹ It was not until 1997 that the first trial commenced, and it was only in September 1998 that the first judgements were delivered.² The Tribunal has countered the criticism of its slow pace by pointing out the complete vacuum in

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1. UN Doc. S/RES/955, 8 Nov. 1994.

2. *The Prosecutor v. Akayesu*, Judgement, Case No. ICTR-96-4-T, T.Ch.I, 2 Sept. 1998 (*Akayesu* Judgement); *The Prosecutor v. Kambanda*, Judgement and Sentence, Case No. ICTR 97-23-S, T.Ch.I, 4 Sept. 1998 (*Kambanda* Judgement). The judgements and other ICTR documents can be found at www.ictr.org.

which it had to start operating. There were hardly any legal precedents to rely on. The ICTR had to 'invent the wheel' with regard to genocide charges. Moreover, the ICTR initially lacked the essentials that any national court has at its disposal, such as a good library, and such basic facilities as a reliable electricity supply and computers.

The Tribunal has taken the criticism seriously, and it has endeavoured to make improvements. In 2003, six judgements concerning nine defendants were delivered. One judgement, in the *Rutaganda* case,³ was rendered on appeal, while five judgements were delivered at first instance, namely in the *Ntakirutimana*,⁴ *Semanza*,⁵ *Niyitegeka*,⁶ and *Kajelijeli*⁷ cases, and in the so-called *Media*⁸ case. In 2004, two judgements at first instance had appeared at the time of writing. The first judgement concerned the former Minister of Education, Jean de Dieu Kamuhanda.⁹ The second judgement was delivered in the so-called *Cyangugu* case.¹⁰

Despite its coming of age and despite its growing case law, the ICTR continues to face legal problems that need to be settled decisively. These legal issues concern both procedural and substantive matters. For instance, it remains unclear what level of specificity is required to describe the charges in the indictment. Drawing on the relevant case law of the International Criminal Tribunal for the former Yugoslavia (ICTY),¹¹ this issue and the ICTR case law so far will be analyzed and commented on in section 1.

When looking at some issues of substantive law it becomes clear that the ICTR took quite some time to explore hitherto uncharted territory, and this is illustrated in sections 2 and 3. Section 2 deals with the ICTR case law on complicity to commit genocide. It identifies some inconsistencies in the ICTR case law and proposes a sounder approach to this form of individual criminal responsibility. Section 3 portrays the ICTR case law on war crimes. In this regard also, recent ICTR case law appears implicitly to overrule some of the earlier findings. In section 3, this new case law is evaluated and put into perspective.

1. VAGUENESS OF THE CHARGES

A frequent complaint in cases before both the ICTY and the ICTR concerns the vagueness of the indictment. The defence may object to a vague indictment on the basis of Article 20, paragraphs 4(a) and (b) of the ICTR Statute, which encapsulate

3. *The Prosecutor v. Rutaganda*, Appeal Judgement, Case No. ICTR-96-3-A, A.Ch., 26 May 2003 (*Rutaganda* Appeal Judgement). This Judgement is only available in French.
4. *The Prosecutor v. E. Ntakirutimana and G. Ntakirutimana*, Judgement, Case No. ICTR-96-10 & ICTR-96-17-T, T.Ch.I, 21 Feb. 2003 (*Ntakirutimana* Judgement).
5. *The Prosecutor v. Semanza*, Judgement, Case No. ICTR-97-20-T, T.Ch.III, 15 May 2003 (*Semanza* Judgement).
6. *The Prosecutor v. Niyitegeka*, Judgement, Case No. ICTR-96-14-T, T.Ch.I, 16 May 2003 (*Niyitegeka* Judgement).
7. *The Prosecutor v. Kajelijeli*, Judgement, Case No. ICTR-98-44A-T, T.Ch.II, 1 Dec. 2003 (*Kajelijeli* Judgement).
8. *The Prosecutor v. Nahimana, Barayagwiza, Ngeze*, Judgement, Case No. ICTR-99-52-T, T.Ch.I, 3 Dec. 2003 (*Media* Judgement).
9. *The Prosecutor v. Kamuhanda*, Judgement, Case No. ICTR-95-54A-T, T.Ch.II, 22 Jan. 2004 (*Kamuhanda* Judgement).
10. *The Prosecutor v. Ntagerura, Bagambiki, Imanishimwe*, Judgement, Case No. ICTR-99-46-T, T.Ch.III, 25 Feb. 2004 (*Cyangugu* Judgement).
11. The ICTY was established by the Security Council, UN Doc. S/RES/827, 25 May 1993. Judgements and other documents can be found at www.un.org/icty.

the right of the accused to be promptly informed on the nature and cause of the charges against him, and to have adequate time to prepare for the defence. Rule 47(C) of the Rules of Procedure and Evidence (RPE) states in more detail that the indictment must contain a 'concise statement of the facts of the case'.

This complaint came to the fore in particular in the *Ntakirutimana* case, the *Semanza* case, and the *Cyangugu* case. The ICTR trial chambers in these cases took note of previous judgements concerning the specificity of the indictment. This case law, which is predominantly ICTY case law, is briefly set out below.

1.1. Previous judgements

According to the statutory provisions and the rules, the prosecution has the duty to indicate which acts of the accused led to the charges of the indictment in order to enable the accused to 'recognize the circumstances and the actions attributed to him in the indictment and the supporting material'.¹² This does not mean that the prosecution has to prove the charges. In this respect, the *Krnojelac* Decision on the form of the indictment is instructive. In this decision, the ICTY trial chamber drew the distinction between the material facts that have to be pleaded on the one hand, and the evidence to prove such facts which must be disclosed on the other.¹³

The question as to which facts are material and sufficient to underpin the charges depends to a large extent on the nature of each case, and cannot easily be determined in general. The ICTY trial chamber in the *Krnojelac* case held that 'an indictment must contain information as to the identity of the victim, the place and the approximate date of the alleged offence and the means by which the offence was committed'.¹⁴ In the *Kvočka* case, it was held that the tribunals are of a different nature when compared to domestic jurisdictions, alluding to the massive scale of the crimes. Hence it held that the prosecution could not at all times be required to provide full detail in the indictment.¹⁵ In the *Brdanin and Talić* case, the ICTY trial chamber set out which facts were material in different situations. In case of a charge of superior responsibility, the trial chamber considered the relationship between the accused and his subordinate as being especially material. It held that factual information should be given in the indictment concerning that relationship. In case of another form of criminal responsibility, such as acting as part of a joint criminal enterprise,

12. *The Prosecutor v. Nahimana*, Decision on the Preliminary Motion Filed by the Defence Based on Defects in the Form of the Indictment, Case No. ICTR-96-11, T.Ch.I, 24 Nov. 1997, para. 20. Trial Chamber I later added in another case that 'the indictment on its own must be able to present clear and concise charges against the accused, to enable the accused to understand the charges', *The Prosecutor v. Nyiramasuhuko and Ntahobali*, Decision on the Preliminary Motion by Defence Counsel on Defects in the Form of the Indictment, Case No. ICTR-97-21-I, T.Ch.I, 4 Sept. 1998, para. 13.

13. *The Prosecutor v. Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, Case No. IT-97-25, T.Ch.II, 24 Feb. 1999, para. 12. Previously, ICTR Trial Chamber I made a similar observation, distinguishing defects in the form of the indictment (are there sufficient material facts given so that the Accused can identify the charges?) and defects in the merit of the indictment (is there sufficient evidence to support the charges?), *The Prosecutor v. Nahimana*, Decision on the Preliminary Motion Filed by the Defence Based on Defects in the Form of the Indictment, Case No. ICTR-96-11, T.Ch.I, 24 Nov. 1997, para. 19.

14. *The Prosecutor v. Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, Case No. IT-97-25, T.Ch.II, 24 Feb. 1999, para. 12.

15. *The Prosecutor v. Kvočka et al.*, Decision on the Defence Preliminary Motions on the Form of the Indictment, Case No. IT-98-30/1, T.Ch., 12 April 1999, paras. 14-17.

the design of the enterprise would be material. Conversely, in the case of direct individual responsibility based on personal involvement, the material facts that must be set out in the indictment should include details such as the identity of the victim, the location of the crime, and its approximate time.¹⁶

Although material facts such as identity of the victim and approximate time and place of the crimes will be more difficult to plead, their initial omission from the indictment might be more easily addressed by disclosed witness statements, in which such facts are belatedly provided. In a situation where an indictment is vague because it does not indicate which form of responsibility is pleaded, it seems unlikely that a witness statement can remedy such omission.¹⁷

The authoritative judgement on the form of the indictment is the ICTY Appeal Judgement in the *Kupreškić* case. In this case, the Appeals Chamber acquitted two accused since there were defects in the indictment and no sufficient evidence was found to sustain the counts.¹⁸ The Appeals Chamber reiterated that the degree of specificity required depended on the nature of the prosecution's case. If the prosecution alleged that an accused had actually committed a criminal act himself, the material facts, such as the identity of the victim, the time and place of the event, and means by which the act was committed, had to be pleaded in detail.¹⁹

However, the Appeals Chamber acknowledged that the sheer scale of crimes such as genocide and crimes against humanity could make it impracticable to require a high degree of specificity, such as the names of all the victims or the dates of the commission of the crimes. When a crime is committed over a prolonged period and has resulted in a large number of victims, it cannot be required that 'each and every victim be identified in the indictment'. It was emphasized, however, that the prosecution must always reveal material facts if it is in a position to do so.²⁰

In the discussion on the role of the indictment, the Appeals Chamber emphasized that the indictment has to inform the defence of its case so that it can prepare for trial. Hence the chamber emphasized that the prosecution has to know and properly present its case *before* going to trial, and it cannot leave out some material facts to be filled in later depending on the evidence that comes out during trial.²¹ In sum, besides the issue as to *which* facts are material and must be pleaded, an additional issue concerns *when* these facts must be pleaded and presented to the defence.

1.2. The *Ntakirutimana* Judgement

The indictment in the *Ntakirutimana* case, a case against a father and son, consisted of two parts, the Bisesero Indictment and the Mugonero Indictment. These indictments

16. *The Prosecutor v. Brđanin and Talić*, Decision on Objections by Momir Talić to the Form of the Indictment, Case No. IT-99-36/1, T.Ch.II, 20 Feb. 2001, paras. 18–22.

17. See also for the curing effect of witness statements in case of a defect in the form of the indictment *The Prosecutor v. Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, Case No. IT-97-25, T.Ch.II, 24 Feb. 1999, paras. 14–15.

18. *The Prosecutor v. Z. Kupreškić, M. Kupreškić, V. Kupreškić, Josipović, Papić, Šantić*, Appeal Judgement, Case No. IT-95-16, A.Ch., 23 Oct. 2001 (*Kupreškić* Appeal Judgement), in particular paras. 124–125, 227, 232, 241, 242, 243.

19. *Kupreškić* Appeal Judgement, *supra* note 18, para. 89.

20. *Ibid.*, paras. 89–90.

21. *Ibid.*, paras. 88, 92, 95, 98.

described in a rather general fashion what happened in Bisesero and Mugonero, and which criminal acts the accused (allegedly) had committed. The Bisesero Indictment stated, for instance, 'from April to June 1994, Elizaphan and Gerard Ntakirutimana and others participated on an almost daily basis in attacks on men, women and children in the area of Bisesero. The attacks resulted in hundreds of deaths.'²² The defence argued that the Bisesero Indictment in particular was too vague, since it mentioned neither specific places, precise times, nor names of victims. Neither did it specify in what way the accused had participated in the commission of the offence. It is clear that such a general description may render it difficult, if not impossible, to prepare a proper defence. It is hard to present a defence of alibi if one does not know at what time the alleged crimes were committed.

The ICTR trial chamber reiterated the observations of the ICTY Appeals Chamber in the *Kupreškić* case,²³ and applied them to the *Ntakirutimana* case. In relation to the Mugonero Indictment, the trial chamber found that it specified the date of the alleged attack – 16 April 1994 – as well as the place where the attack had allegedly occurred – the Mugonero Complex. The indictment did not specify exactly how the two accused participated in the attack. The chamber considered this to be lacking in precision, but stated that the imprecision was addressed by other details provided, such as the date and the place of the crime.²⁴

As regards the Bisesero Indictment, the trial chamber acknowledged that in the situation of Bisesero there were frequent attacks over a prolonged period of time, and that therefore it might have been difficult for the prosecution to establish precisely which attack occurred when and where, and who the victims were. In addition, the trial chamber recognized that it might be even harder to establish such 'details' given that the alleged crimes occurred some eight years previously, and bearing in mind that the witnesses, mainly survivors, were under great distress at the time of the crimes.²⁵

The trial chamber found the Bisesero Indictment to be too vague, and it held accordingly that the accused had not received sufficient notice of the case against them. The trial chamber noted, however, that the prosecution had given some additional details in the pre-trial brief by disclosing some 80 witness statements to the defence. Annex B to the pre-trial brief, summarizing the statements of witnesses who would be called to trial and thus being most indicative of the material facts, was submitted one month before the trial started. The trial chamber stated that the pre-trial brief and its annex B in addition to the disclosed witness statements could address the defects in the indictment.

After this finding the trial chamber determined, separately for each charge of the Bisesero Indictment, whether there had been sufficient notice to the accused. Some charges were dismissed because it was found that there had not been sufficient

22. *The Prosecutor v. E. Ntakirutimana and G. Ntakirutimana*, Amended Indictment, Case No. ICTR-96-17-T, 7 July 1998.

23. *Ntakirutimana* Judgement, *supra* note 4, para. 49.

24. *Ibid.*, paras. 53–54.

25. *Ibid.*, paras. 55–63.

notice.²⁶ Allegations that Elizaphan Ntakirutimana personally murdered a number of identified persons were dismissed for lack of sufficient notice to the accused. In some instances, the allegation was put forward for the first time at trial when the witness testified in court.²⁷ In such instances, the trial chamber determined that it could not deal with the accusation for lack of sufficient notice to the accused.

1.3. The *Semanza* Judgement

In the *Semanza* case the trial chamber dismissed a substantial part of the indictment because of its vagueness, without alluding to the pre-trial brief or to the disclosure of witness statements. Some of the paragraphs in the indictment concerned general allegations covering a period of one to four years.²⁸ This was considered unacceptable, 'particularly where the allegations are devoid of any other detail that might assist the accused in identifying the events alluded to in the indictment. Notably, these paragraphs even neglect to mention the most basic of details such as the commune where the events allegedly occurred'.²⁹ With regard to other vague charges,³⁰ the Chamber observed that 'These paragraphs refer broadly to the accused's responsibility as a superior and as an accomplice to the direct perpetrators for unspecified rapes and other acts of sexual violence which allegedly occurred in Bicumbi and Gikoro between 6 April and 30 April. These dates are problematic in particular because this part of the indictment fails to identify any specific criminal act, location, or conduct'.³¹

1.4. The *Cyangugu* case

In the *Cyangugu* case, the trial chamber was equally strict, and somewhat more elaborate, on the exact requirements of a clear indictment and the consequences of

26. *Ibid.*, paras. 565; 613–614; 669; 690; 697–698.

27. *Ibid.*, paras. 613–614; 697.

28. Namely paras. 3.7, 3.8 and 3.9 of the Indictment. ('3.7 Between 1991 and 1994, Laurent SEMANZA chaired meetings during which he made threatening remarks towards Tutsis and those who were not MRND members.', '3.8 As of the beginning of 1994, Laurent SEMANZA chaired meetings to incite, plan and organize the massacres of the Tutsi civilian population.', and '3.9 As early as 1991, Laurent SEMANZA aided and participated in the distribution of weapons and the training of young MRND militiamen, the *Interahamwe* who were well structured, complementary and acted in concert with the Armed Forces in the non-international armed conflict above mentioned (sub-parag. 3.4.2), and continued to do so until 1994, inclusive. During the events referred to in this indictment, several of these militiamen were directly involved in the massacres of the Tutsi civilian population. Laurent SEMANZA intended these massacres to be in junction with the non-international armed conflict as stated in subparagraph 3.4.3 *supra*.')

29. *Semanza* Judgement, *supra* note 5, para. 50.

30. Namely paras. 3.15 and 3.16 of the Indictment. ('3.15 Between 6 April and 30 April, 1994, in Bicumbi and Gikoro Communes, Laurent SEMANZA instigated, ordered and encouraged militiamen, in particular *Interahamwe*, and other persons to rape Tutsi women or commit other outrages upon the personal dignity of Tutsi women, and such people did rape Tutsi women or commit other outrages upon the personal dignity of Tutsi women in response to the instigation, orders and encouragement of SEMANZA.', and '3.16 Between 6 April and 30 April, 1994, in Bicumbi and Gikoro Communes, Laurent SEMANZA had *de facto* and/or *de jure* authority and control over militiamen, in particular *Interahamwe*, and other persons, including members of the Rwandan Armed Forces (FAR), communal police and other government agents, and he knew or had reason to know that such persons were about to commit acts of rape or other outrages against the personal dignity of Tutsi women, and he failed to take necessary and reasonable measures to prevent such acts, which were subsequently committed. Laurent SEMANZA intended the acts described in Paragraphs 3.15 and 3.16 to be part of the non-international armed conflict against the RPF as stated in subparagraphs 3.4.2 and 3.4.3 *supra*.')

31. *Semanza* Judgement, *supra* note 5, para. 51.

vague charges. To start with, the trial chamber distinguished between the nature of the charges as referring to the legal qualification and the cause of the charges as referring to the underlying facts.³² Subsequently it provided a rather extensive overview of the applicable principles, drawing on prior ICTY and ICTR case law, as sketched above.³³ In short, the trial chamber held that the indictment is the place where the charges must be properly set out. Furthermore, the way in which the accused participated must be sufficiently clearly indicated; a sole reference to Article 6(1) of the ICTR Statute is not enough. Which facts must be pleaded further depends on the form of participation. For instance, in case of accomplice liability the prosecution must indicate exactly which acts the accused aided and abetted. In case of superior responsibility the facts should relate to the relationship between the superior and the subordinate, the superior's knowledge of the crimes, and possible measures to prevent or to punish.

In scrutinizing the *Cyangugu* Indictment on the basis of the principles set out earlier, the trial chamber concluded that various counts had not been pleaded in sufficient detail. In the words of the trial chamber, 'the operative paragraphs underpinning the charges against Ntagerura, Bagambiki and Imanishimwe as well as the charges themselves are unacceptably vague'.³⁴ Unlike the trial chamber in the *Ntakirutimana* case, this trial chamber did not consider it appropriate to repair this defect by taking account of the pre-trial brief and other pre-trial submissions. It stated, 'The Trial Chamber and the accused should not be required to sift through voluminous disclosures, witness statements, and written or oral submissions in order to determine what facts may form the basis of the accused's alleged crimes, in particular, because some of this material is not made available until the eve of trial'.³⁵

Given these findings, the trial chamber had to deliberate on the consequences. Based on the *Kupreškić* Appeal Judgement, it decided to verify whether strong evidence existed against the accused that came within the confines of the present indictment. If so, it would then determine what the effect on the evidence of the lack of notice was, and possibly adjust its findings accordingly.³⁶ However, some parts of the indictment were not taken into account at all, since either no proof had been offered to substantiate the charges or these paragraphs omitted to indicate to what crimes the alleged facts amounted.³⁷

1.5. Assessment

In all the cases the question of whether the charges were too vague was dealt with at the close of the trial, and not as a pre-trial matter as is usually the case. It was thus no longer possible to direct the prosecution to amend the indictment.

32. *Cyangugu* Judgement, *supra* note 10, para. 29.

33. *Ibid.*, paras. 29–39.

34. *Ibid.*, para. 64.

35. *Ibid.*, para. 66.

36. *Ibid.*, para. 68.

37. *Ibid.*, para. 69.

Despite the fact that the trial chamber dismissed some of the charges against the Ntakirutimanas, it was lenient in that it found that specification of the material facts only one month before the commencement of the trial could have the effect of rectifying the defective indictment. In the *Niyitegeka* Judgement the trial chamber endorsed the *Ntakirutimana* Judgement and noted that 'Disclosure of witness statements, the Pre-Trial Brief or other materials, and knowledge acquired during the course of the trial, may have the effect of curing any lack of notice in the Indictment'.³⁸ The trial chamber submitted that it had followed the *Kupreškić* Appeal Judgement. However, as illustrated above, the ICTY Appeals Chamber also emphasized that the indictment served as a basis for the defence's preparation, and consequently that the prosecution had to present its case *before* going to trial. Hence, knowledge acquired during trial cannot in itself cure a defective indictment.

In the *Semanza* Judgement the trial chamber dismissed the charges of public and direct incitement to commit genocide and rape as a crime against humanity as a result of its findings that the charges were too vague. In doing so it appeared to apply the specificity requirements more strictly. It is unclear from the Judgement whether the trial chamber took account of the pre-trial brief or disclosed witness statements, or whether it considered these to be irrelevant.

The trial chamber in the *Cyangugu* case was by far the most instructive. It outlined quite extensively which principles apply and thus offered some useful guidelines for the prosecution. The chamber was also very clear in requiring that all material facts be pleaded in the indictment, and not in various pre-trial and other documents. This surely is the appropriate starting point.

The problem set out in this section illustrates that in practice it is not as simple as it may appear to allude to the exact facts that can sustain allegations. Yet since the overarching objective of the Tribunal is to ensure a fair trial, it is imperative that all chambers adopt and maintain clear and consistent standards regarding the form of the indictment. Allowing the prosecution to rectify a defective indictment only one month before trial does not seem to be in line with this objective.

2. COMPLICITY IN GENOCIDE

Elizaphan Ntakirutimana and Laurent Semanza were both convicted as accomplices in genocide. The two judgements addressed important issues such as the *mens rea* requirement for complicity in genocide.

At the outset, it must be noted that the two accused were convicted under different provisions of the Statute. Elizaphan Ntakirutimana was convicted of aiding and abetting the commission of genocide under Article 6(1) of the ICTR Statute, whereas Laurent Semanza was convicted of complicity in genocide pursuant to Article 2(3)(e) of the ICTR Statute. The question arises whether there is a difference between these two counts.

38. *Niyitegeka* Judgement, *supra* note 6, para. 44.

2.1. Previous judgements

In the *Akayesu* Judgement, the trial chamber distinguished between aiding and abetting as specified in Article 6(1) of the ICTR Statute, applicable to all crimes within the Tribunal's jurisdiction, and complicity in genocide specified in Article 2(3)(e) of the ICTR Statute.³⁹ The trial chamber determined that a person can be convicted of complicity to commit genocide if he knew or had reason to know that the principal perpetrator was acting with genocidal intent, whereas aiding and abetting requires proof of the specific intent ('intent to destroy'). Assuming that the principal had specific (genocidal) intent, aiding and abetting would require the accomplice to share the principal's *mens rea*, whereas for complicity in genocide knowledge of the principal's *mens rea* would suffice.

In the *Kayishema and Ruzindana* case, the trial chamber appeared to make an inverse interpretation. It required specific intent for all forms of committing genocide pursuant to Article 2(3) ICTR Statute and knowledge of the genocidal intent for aiding and abetting genocide.⁴⁰ In the *Musema* case, the trial chamber repeated the findings of the *Akayesu* Judgement.⁴¹ The trial chamber in the *Bagilishema* case endorsed the view that complicity requires that the accused acts knowingly, and not necessarily with specific intent.⁴² The trial chamber in *Bagilishema* further determined that knowledge of the principal's specific intent equally suffices as the *mens rea* for 'aiding and abetting' in genocide, punishable under Article 6(1) of the ICTR Statute.⁴³ Based on this judgement all forms of complicity require knowledge rather than specific intent.

The latter interpretation accords with Anglo-American complicity law, where it suffices that the aider and abettor knew the principal elements of the crime and while having the commission of that principal crime 'within his contemplation'.⁴⁴ This has been referred to as a 'reduced' *mens rea* standard.⁴⁵ An analogy can be found in civil law legal systems in the notion of 'double intent', that is, intent with regard to one's own conduct and that of the principal.⁴⁶ The latter intent does not include all aspects of the principal crime; it suffices that the participant knew the essential elements of the underlying crime (e.g. genocidal intent). Assuming that general principles of criminal law ensue from these legal systems, the findings of the ICTR in the *Akayesu*, *Musema*, and *Kayishema and Ruzindana* judgements on the mental element of complicity in genocide and aiding and

39. See for a commentary on this judgement W. A. Schabas in A. Klip and G. Sluiter (eds.), *Annotated Leading Cases*, Vol. II (2000), 547; W. A. Schabas, *Genocide in International Law* (2000), 293 et seq.

40. *The Prosecutor v. Kayishema and Ruzindana*, Judgement, Case No. ICTR-95-1-T, T.Ch.II, 21 May 1999 (*Kayishema and Ruzindana* Judgement), paras. 91 and 205, 207 resp.

41. *The Prosecutor v. Musema*, Judgement, Case No. ICTR-96-13-T, T.Ch.I, 27 Jan. 2000 (*Musema* Judgement), paras. 168–183. *Akayesu* Judgement, *supra* note 2, paras. 530, 532.

42. *The Prosecutor v. Bagilishema*, Judgement, Case No. ICTR-96-13-T, T.Ch.I, 7 June 2001 (*Bagilishema* Judgement), para. 71.

43. *Ibid.*, para. 36.

44. *D.P.P. for Northern Ireland v. Maxwell* [1978] 3 All ER 1140. See J. C. Smith, *Smith & Hogan. Criminal Law* (1996), 129–130, and J. Gardner, 'Aid, Abet, Counsel, Procure: An English View of Complicity', in A. Eser et al. (eds.), *Individual, Participatory and Collective Responsibility in Criminal Law* (1998), 229.

45. T. Wu and Y. Kang, 'Criminal Liability for the Actions of Subordinates – the Doctrine of Command Responsibility and its Analogues in United States Law', (1997) 38 *Harvard International Law Journal* 275.

46. H. H. Jescheck and T. Weigend, *Lehrbuch des Strafrechts. Allgemeiner Teil* (1996), 691–6.

abetting the commission of genocide deviate from general principles of complicity law.

2.2. The *Ntakirutimana* Judgement

In the case of *Ntakirutimana*, the trial chamber identified three elements of ‘aiding and abetting’ within the meaning of Article 6(1), namely:

- (i) that the Accused provided to persons practical assistance (‘aiding’), or facilitated the commission of the crime by being sympathetic thereto (‘abetting’);
- (ii) that the act of aiding or abetting contributed substantially to the commission of the crime of genocide; and
- (iii) that the Accused provided such assistance or encouragement with the intent to commit genocide, that is, the intent to destroy, in whole or in part, an ethnic or racial group, as such.⁴⁷

Hence, in this case, the trial chamber relied on the finding in the *Akayesu* Judgement that aiding and abetting requires specific intent.

The trial chamber was of the view that the prosecution had proved that Elizaphan Ntakirutimana had transported attackers and had been present at the scene of the crime. He was not himself found guilty of killing, or of ordering other attackers to kill. The chamber found that Ntakirutimana’s acts ‘constituted practical assistance and encouragement to these attackers, which substantially contributed to the commission of the crime of genocide by these attackers’.⁴⁸ As to Ntakirutimana’s intent, the trial chamber held that

From his presence and actions in relation to the attack at the Complex, from the letter he received on the eve of the attack, in which the Tutsi pastors pleaded for his assistance adding, ‘tomorrow we shall die with our families’, Elizaphan Ntakirutimana knew that Tutsi, in particular, were being targeted for attack, and that by transporting attackers to the Complex, he would be assisting in the attack against the Tutsi. The Chamber has also taken into account his actions in Bisesero, for instance, transporting armed attackers to various parts of Bisesero and pointing out Tutsi refugees to the armed attackers who then attacked these refugees, and ordering attackers to remove the roof of Murambi Church so that it could not be used as a hiding-place for Tutsi. Based on the totality of the evidence before it, the Chamber finds that Elizaphan Ntakirutimana had the requisite intent to commit genocide, that is, the intent to destroy, in whole the Tutsi ethnic group.⁴⁹

The prosecution appealed against this part of the judgement, arguing that the chamber erred in law by requiring specific intent for aiding and abetting. The prosecution claimed that given the chamber’s finding that Elizaphan Ntakirutimana had the specific intent, he should have been convicted as a principal perpetrator.⁵⁰

47. *Ntakirutimana* Judgement, *supra* note 4, para. 787.

48. *Ibid.*, para. 788.

49. *Ibid.*, para. 789.

50. *The Prosecutor v. E. Ntakirutimana and G. Ntakirutimana*, Prosecution Notice of Appeal, Case No. ICTR-96-10 & ICTR-96-17-A, A.Ch., 21 March 2003 (Third Ground of Appeal).

2.3. The *Semanza* Judgement

In the *Semanza* Judgement, the trial chamber concurred with the findings of the trial chamber in *Bagilishema*. It held that there was no 'material distinction' between aiding and abetting in genocide and complicity to commit genocide. As to the mental element, it determined that

An individual acts intentionally and with the awareness that he is influencing or assisting the principal perpetrator to commit the crime. The accused need not necessarily share the *mens rea* of the principal perpetrator; the accused must be aware, however, of the essential elements of the principal's crime including the *mens rea*.⁵¹

The trial chamber noted its deviation from the *Ntakirutimana* and *Akayesu* Judgements, but indicated that in these cases no explanation or justification had been given as to why aiding and abetting required a different mental element than did complicity.⁵²

The trial chamber established that Semanza had gathered the *Interahamwe* (the militia group primarily implicated in the killings) for an attack on a church and that he had directed them to kill. Based on Semanza's actions and words, the chamber found that Semanza had the specific intent to destroy the Tutsi ethnic group as such. It was further established that Semanza had fired into a crowd consisting mainly of Tutsi refugees. However, there was no proof beyond a reasonable doubt that bodily harm resulted from this action. The trial chamber held that with regard to this attack, Semanza still had specific intent:

In addition, the Accused's specific intent to destroy the Tutsi group as such is reflected by the fact that he instructed soldiers to separate Hutu from Tutsi, who were then killed by gunfire and grenades. Moreover, the Chamber infers the accused's genocidal intent from the statement he made to the principal attackers after they had completed the killings at Mabare mosque on 12 April 1994: 'We came to assist you, and I believe that those who have not been killed would not be able to resist you. Go and find them and exterminate them.'

The Chamber finds that in gathering *Interahamwe* for the attack on refugees at Musha church, the Accused provided substantial assistance, and thereby aided and abetted the principal perpetrators in committing the acts of genocide that occurred there. In addition, it was immediately after the direction of the Accused that the attackers killed the Tutsi refugees after they had been separated from the Hutus. By reason of the foregoing acts, coupled with his specific intent, the Chamber finds that the Accused aided and abetted in the massacres at Musha church, as described above.⁵³

Semanza was not convicted as a principal perpetrator. Given the 'nature of his participation' he was held criminally responsible as an accomplice.⁵⁴ In other words, despite the trial chamber's finding that Semanza had the requisite *mens rea*, he lacked the *actus reus* for being a principal perpetrator of genocide: he had not killed personally.

51. *Semanza* Judgement, *supra* note 5, paras. 388, 394.

52. *Ibid.*, n. 648.

53. *Ibid.*, paras. 429–430.

54. *Ibid.*, paras. 425–436.

2.4. Assessment

The judgements discussed above raise questions, first, since they differ one from another and, second, because they deviate from general principles of complicity law. The contradictions that exist between the above-discussed rulings originate from misunderstandings regarding the principal–accomplice structure of Anglo-American complicity doctrine and the reduced *mens rea* standard for accomplices.

Anglo-American complicity law influenced the Nuremberg and post-Nuremberg proceedings, and underlies the model of participatory liability at both the ICTY and the ICTR.⁵⁵ Anglo-American complicity law also underlies the Genocide Convention. Its drafters intended ‘complicity’ to connote the common law concept of complicity.⁵⁶ As was shown earlier, this law adopts a ‘reduced’ *mens rea* standard for complicity (aiding and abetting). The reduced *mens rea* standard has been adopted in ICTY case law regarding aiding and abetting, and renders the diverging ICTR findings in *Akayesu*, *Musema*, and *Ntakirutimana* untenable.⁵⁷ *Aiding* and *abetting* are just two ways in which an accessory assists in the commission of an offence and can be held criminally responsible for *complicity* in the crime.⁵⁸ This leaves us to conclude that also for complicity the reduced *mens rea* standard suffices. Distinguishing between aiding and abetting and complicity liability by identifying two distinct *mens rea* standards should, therefore, be faulted.⁵⁹

The attempt to uncover two mental standards may be explained by the somewhat uncomfortable combination of the reduced *mens rea* standard of complicity (knowledge of the principal’s intent) and the *dolus specialis* of the ‘génocidaire’ who is not the principal. Consider Schabas’s observations with regard to the findings of the *Akayesu* Judgement on this point:

This assessment by the Rwanda Tribunal cannot be correct, and confuses the issue of knowledge of the principal offender’s intent with the accomplice’s intent. It also flies in the face of a consistent line of authority by which a specific intent is an essential element of the offence. In reality, genocide is more likely to be committed where the principal offender – the actual murderer – lacks genocidal intent, but is incited or directed to commit the crime by a superior – technically an accomplice – who possesses the genocidal intent. The principal offender is a subordinate who may possibly be ignorant of the genocidal plan. He or she follows an order to commit an act while unaware that the intent behind the order is to destroy a group in whole or in part. The superior orders the murder, but does not in fact commit it, and is therefore an accomplice or principal in the second degree. The better view, then, is that a person prosecuted for genocide as an accomplice must have the special intent required by

55. See E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), 25–30, 61–114.

56. Schabas (2000), *supra* note 39, at 293.

57. The *Krnjelac* and *Furundžija* Judgements are instructive on this point: *The Prosecutor v. Krnjelac*, Judgement, Case No. IT-97-25-T, T.Ch., 15 March 2002 (*Krnjelac* Judgement), paras. 88–90; *The Prosecutor v. Furundžija*, Judgement, Case No. IT-95-17/1-T, T.Ch., 10 Dec. 1998 (*Furundžija* Judgement), para. 232.

58. Smith, *supra* note 44, at 130; *Att.-Gen. Reference* (No. 1 of 1975), [1975] 2 All ER 684, at 686.

59. In a recent case, however, the ICTY Appeals Chamber determined that there is authority to suggest that complicity to commit genocide *does* require proof that the accomplice had specific intent. This would mean that complicity as a mode of criminal participation has moved away from its common-law origins with regard to genocide. *The Prosecutor v. Krstić*, Appeal Judgement, Case No. IT-98-33-A, 19 April 2004, para. 142.

Article II of the Convention, and is culpable even if the principal offender lacks such special intent.⁶⁰

Further – and this touches upon the same problem – the Anglo-American complicity terminology in which the physical perpetrator is referred to as the principal and his partner in crime as a secondary party seems ‘inappropriate’ with regard to an *auctor intellectualis*, like Akayesu, who can be seen to be the real ‘génocidaire’. Again Schabas can be cited:

Complicity is sometimes described as secondary participation, but when applied to genocide, there is nothing ‘secondary’ about it. The ‘accomplice’ is often the real villain, and the ‘principal offender’ a small cog in the machine. Hitler did not, apparently, physically murder or brutalize anybody; technically, he was ‘only’ an accomplice to the crime of genocide.⁶¹

Schabas’s observations reflect the misleading terminology of Anglo-American complicity law. While an accomplice may be referred to as a secondary participant, there is nothing secondary about his responsibility. The secondary–principal terminology refers to a technical rather than a normative distinction. An accomplice’s responsibility is ‘secondary’ because, unlike the principal, he does not directly cause the *actus reus* of the crime. The terminology is particularly misleading with regard to system criminality such as genocide, where the major criminals are often behind the scene of the crime as *auctor intellectualis*, qualifying as secondary participants but bearing primary responsibility. Indeed, the complicity doctrine, with its singular distinction between principals and accomplices, does not allow for an *auctor intellectualis* with a perpetrator-like status.

Complicity doctrine further fails to recognize the secondary participant who is a full participant in the crime and fulfils part of the *actus reus*; the so-called co- or joint principal. Bearing in mind the *Semanza* Judgement, where the facts established that the accused was a full participant in genocide but that his acts fell short of direct perpetration, one might deem it useful to distinguish between secondary participation as mere assistance and secondary participation as co-perpetration. Here we may be reminded of the fact that the ICTY in its case law devised the concept of joint criminal enterprise to convict joint principals, which may be taken to demonstrate that the complicity concept as laid down in the statutes of the tribunals does not suffice.⁶²

Most civil-law systems differentiate between co-perpetrators, facilitators, and instigators.⁶³ An instigator and a joint principal can be punished as a principal/perpetrator.⁶⁴ The accused before the ICTR can often be appropriately described as instigators and joint principals, and it is against this background that we should understand the attempt of the ICTR trial chambers in *Akayesu*, *Musema*,

60. Schabas (2000), *supra* note 39, at 221.

61. *Ibid.*, at 286.

62. See van Sliedregt, *supra* note 55, at 93–101.

63. J. Pradel, *Droit pénal comparé* (1995), 278; G. P. Fletcher, *Rethinking Criminal Law* (1978), 640–5. See also Krstić Appeal Judgement, *supra* note 59, para. 141.

64. Jescheck and Weigend, *supra* note 46, at 645–6.

Kayishema and Ruzindana, and *Ntakirutimana* to draw a distinction between aiding and abetting and complicity.

Despite the limitations of the common law participation model, it still provides a useful basis for conviction. We should nuance the above-described differences between the ‘differentiated’ civil-law model and the ‘dual’ Anglo-American model. While the former qualifies the degree of participation at the attribution stage, the latter expresses the difference in degree of participation at the sentencing stage. The end result is the same. Complicity liability – whether as aiding and abetting under Article 6(1) or as complicity under Article 2(3)(e) of the ICTR Statute – may still provide the appropriate ground for convicting a secondary party who could be referred to as an instigator. By taking into account the accused’s role and degree of participation his responsibility as an instigator may be appropriately reflected in the sentence. The latter was done in the *Semanza* case and seems a sound and legitimate way of attributing criminal responsibility. Moreover, there is no immediate need for a distinction between accomplices and joint principals at the ICTR, since co- or joint perpetration can be dealt with by relying on conspiracy under Article 2(3)(b) of the ICTR Statute.

A last word on the *mens rea* of genocide. Much has been said and written on the genocidal intent.⁶⁵ This paper is not the place to go into this highly specialized and difficult discussion; however, the following remarks can be made.

Whether we consider the special intent, or *dolus specialis*, to be an element of *mens rea* besides general intent (for genocidal acts such as killing members of the group), or to be an additional subjective requirement of the crime of genocide, the accused accomplice need not share the *mens rea* of the principal perpetrator; knowledge of this intent suffices. This also applies to an accomplice who may be seen to bear primary responsibility. He or she may have the special intent, like *Semanza*, but proof of the reduced *mens rea* standard suffices. This may cause problems when – as Schabas pointed out earlier – the principal lacked genocidal intent. Incitement and conspiracy offer ways out of this.

At this point it is interesting to remind ourselves of Greenawalt’s plea for a knowledge-based interpretation of genocidal intent. He points at the ‘danger’ of adhering to a specific intent standard in cases where evidentiary problems may lead to situations where culpable perpetrators escape liability for genocide.⁶⁶ Greenawalt uses the example of a subordinate who claims to have been simply carrying out the genocidal directives of his superiors while lacking the specific genocidal intent himself. Another danger of insisting on proof of a special intent may be that evidentiary problems lead courts to ‘squeeze ambiguous fact patterns into the specific intent paradigm’.⁶⁷ This is evidenced by the contrived ruling of the trial chamber

65. See C. Aptel, ‘The Intent to Commit Genocide in the Case Law of the International Criminal Tribunal for Rwanda’, (2002) 13 *Criminal Law Forum* 273; R. Arnold, ‘The Mens Rea of Genocide under the Statute of the International Criminal Court’, (2003) 14 *Criminal Law Forum* 127; A. K. A. Greenawalt, ‘Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation’, (1999) 99 *Columbia Law Review* 2259; O. Triffterer, ‘Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such’, (2001) 14 *LJIL* 399; C. Tournaye, ‘Genocidal Intent before the ICTY’, (2003) 52 *ICLQ* 447; Schabas, *Genocide*, *supra* note 37, at 206–56.

66. Greenawalt, *supra* note 65, at 2281.

67. *Ibid.*

in *Akayesu* and may be further illustrated by the trial chamber's observation that genocidal intent '[i]s a mental factor which is difficult, even impossible, to determine'.⁶⁸ Complicity doctrine circumvents the requirement of proof of specific intent. The reduced *mens rea* standard for the *auctor intellectualis* is in essence a knowledge-based interpretation of genocidal intent and provides what Greenawalt views as the solution for evidentiary problems with genocidal intent in general.

3. WAR CRIMES: THE NEXUS REQUIREMENT

The *Rutaganda* Appeal Judgement constitutes the very first conviction for war crimes by the ICTR. Until this judgement the so-called nexus requirement had posed an insurmountable obstacle to the prosecution. This requirement calls for a criminal act to be closely linked to an armed conflict. If such a link cannot be proved, the act cannot be qualified as a war crime. In the *Semanza* case the trial chamber came close to a conviction on war crimes. The judgement in this case was rendered just a few days before the *Rutaganda* Appeal Judgement. In the *Cyangugu* case, the ICTR for the first time tried someone from the military, namely Imanishimwe. A conviction on war crimes was entered in this case as well. The analysis below examines to what extent recent ICTR case law marks a turning-point in the overall ICTR jurisprudence on war crimes.

3.1. Previous judgements

The leading ICTR case on war crimes so far is the *Akayesu* Appeal Judgement,⁶⁹ where the Appeals Chamber held that the class of perpetrators of war crimes was not restricted to members of the armed forces; anyone could commit a war crime. While the Appeals Chamber endorsed the reasoning that 'common Article 3 requires a close nexus between violations and the armed conflict', it found that this did not entail a special relationship between the perpetrator and a party to the armed conflict in all cases.⁷⁰ The Appeals Chamber in the *Akayesu* case stated that for the nexus requirement to be fulfilled 'it is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict'.⁷¹ The Appeals Chamber further noted that the exact interpretation of what constitutes a close link to an armed conflict was not relevant in the case before it. It is unfortunate that it did not provide criteria to determine when a close link with the armed conflict exists in the ICTR context, particularly since it pronounced its views for the sake of the development of its (own) case law.⁷²

68. *Akayesu* Judgement, *supra* note 2, para. 523.

69. *The Prosecutor v. Akayesu*, Appeal Judgement, Case No. ICTR-96-4-A, 1 June 2001 (*Akayesu* Appeal Judgement).

70. *Ibid.*, paras. 438, 444.

71. *Ibid.*, at n. 807, referring to *The Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, A.Ch. 2 Oct. 1995, para. 70.

72. The prosecution's ground of appeal regarding war crimes did not fall within the scope of Article 24 – the provision that regulates appeal – *stricto sensu*. Nevertheless, the Appeals Chamber decided to consider this issue of 'general importance' with a view to 'unifying the law', *Akayesu* Appeal Judgement, *supra* note 68, paras. 12–28. Judge Nieto-Navia argued in a dissenting opinion that the Appeals Chamber should not have considered the appeal filed by the prosecution regarding war crimes, because neither Article 24 of the Statute nor any other provision equips the Appeals Chamber with such a power to give 'advisory opinions'. By

In the absence of clear guidelines ICTR trial chambers have determined the existence of a link on a case-by-case basis.⁷³ In so doing, they have applied a high threshold, insisting on a direct relation between the act and the armed conflict.⁷⁴ As a consequence, up until the *Rutaganda* case in appeal, all accused had been acquitted of war crimes.

The high threshold set by the chambers has been criticized in scholarly writing.⁷⁵ Additionally, national war crimes trials do not follow this jurisprudence. A Swiss military tribunal expressly deviated from the criterion in the case of Niyonteze, a Rwandan mayor, and qualified the ICTR's approach as 'too restrictive'.⁷⁶ In an *amicus curiae* brief submitted in the *Semanza* case, Belgium endorsed this qualification and submitted that the intervention of the Rwandan Patriotic Front (RPF, the Tutsi-dominated rebel group) in 1990 was one of the direct causes of the Rwandan genocide.⁷⁷

The ICTY seems to apply a less stringent nexus requirement. In the Judgement of *Kunarac et al.*, the ICTY Appeals Chamber held that 'if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict'.⁷⁸ One should bear in mind that the determination of a nexus is a factual affair, as was also pointed out by Belgium in its brief, and that the factual context in which the ICTY operates is of a different nature than that of the ICTR. Yet this observation does not apply to the Swiss case, which directly criticized the ICTR case law. Hence the issue at stake for the ICTR is not so much whether there is a nexus requirement, but rather how this nexus requirement should be interpreted and applied.

3.2. The *Semanza* Judgement

In the *Semanza* case the trial chamber identified the requirements for a conviction of war crimes, namely (i) that a non-international armed conflict existed in Rwanda; (ii) that the victims were protected persons; and (iii) that a nexus existed between

rendering pronouncements on issues that would not affect the result of the judgement of the trial chamber, the Appeals Chamber arbitrarily broadened the scope of (Article 24 of) the Statute.

73. *Kayishema and Ruzindana* Judgement, *supra* note 40, para. 188. Also here, Trial Chamber II held that a nexus test cannot be defined in abstract terms.
74. R. Boed, 'Individual Criminal Responsibility for Violations of Article 3 Common to the Geneva Conventions of 1949 and of Additional Protocol II Thereto in the Case Law of the International Criminal Tribunal for Rwanda', (2002) 13 *Criminal Law Forum* 293 at 320.
75. *Ibid.*; A. Obote-Odora, 'Prosecution of War Crimes by the International Criminal Tribunal for Rwanda', (2001) 8 *Murdoch University Electronic Journal of Law* 2; lecture given by C. Eboe-Osuji on 'The Contribution of the ICTR to the Development of War Crimes Jurisprudence', for the ICTR Internship Education Programme, 11 April 2003.
76. *Public Prosecutor v. Niyonteze*, Tribunal militaire d'appel 1A, 26 May 2000, Part III, Chapitre 3, Section 2. On appeal, however, the Military Tribunal of Cassation noted that the Court of Appeal had not deviated from the ICTR case law, 27 April 2001, para. 9 (both judgements can be found at <http://www.vbs.admin.ch/internet/OA/e/urteile.htm>). However, in a case note, Reydam's notes that despite the similarity between this case and the case of *Akayesu* (twin trials), and the application of the same legal standard, both courts (the ICTR and the Swiss Military Tribunal of Cassation) came to different conclusions. L. Reydam's, (2002) 96 *AJIL* 231 at 235.
77. *The Prosecutor v. Semanza*, Petition by the Kingdom of Belgium to Appear as *Amicus Curiae*, Case No. ICTR-97-20, T.Ch.III, 8 Dec. 2000, paras. 17–18, 25.
78. *The Prosecutor v. Kunarac, Kovac and Vuković*, Appeal Judgement, Case No. IT-96-23-A & IT-96-23/1-A, A.Ch., 12 June 2002, para. 58 (*Kunarac* Appeal Judgement).

the alleged act and the armed conflict. The application of the first two requirements did not pose any problem. The interpretation of the third requirement, however, caused disagreement between the judges. Judge Dolence and Judge Williams found that a nexus existed, whereas Judge Ostrovsky submitted a Separate Opinion on this matter.

The majority in the *Semanza* case referred to the *Kunarac* Appeal Judgement and further held that 'the ongoing armed conflict between the Rwandan government forces and the RPF ... both created the situation and provided a pretext for the extensive killings and other abuses of Tutsi civilians'.⁷⁹ The trial chamber recalled that 'in this case the killings began in Gikoro and Bicumbi communes, shortly after the death of President Juvénal Habyarimana, when the active hostilities resumed between the RPF and government forces'.⁸⁰ The trial chamber ruled that 'certain civilian and military authorities, as well as other important personalities, exploited the armed conflict to kill and mistreat Tutsis in Bicumbi and Gikoro', and that 'the armed conflict also substantially motivated the attacks perpetrated against Tutsi civilians in Bicumbi and Gikoro'.⁸¹ The trial chamber had no doubt that the nexus requirement was fulfilled.

The application of the threshold requirement appears general and not case-specific. For instance, the observation that the genocidal killings started shortly after the plane crash which killed President Habyarimana does not only concern the Gikoro and Bicumbi communes. Moreover, it is unclear how this qualification of events relates to an earlier finding of the trial chamber in *Akayesu*, when it was found that the genocide took place *alongside* the armed conflict, and was not an inherent part of it.⁸² In the latter judgement the trial chamber held that 'although the genocide against the Tutsi occurred concomitantly with the ... conflict, it was, evidently, fundamentally different from the conflict'.⁸³

Dissenting from the majority in the *Semanza* Judgement, Judge Ostrovsky opposed too much reliance on the *Kunarac* Appeal Judgement of the ICTY, since this judgement concerned a different armed conflict. Judge Ostrovsky held that

The character of the armed conflict in Rwanda was different. Having started the war in 1990, the RPF did not target any ethnicity. It was a war for power in the country. There is no evidence that there was a genocide in 1990, 1991, 1992, and 1993. The policy of genocide was unleashed only after 6 April 1994, and not by the RPF, and not against the RPF and its members. The evidence shows that this policy of genocide was unleashed by the Rwandan authorities against their own civilian population of a particular ethnicity. This crime was parallel to the armed conflict, but never intersected with it.⁸⁴

Even though two judges found that the nexus requirement had been fulfilled, *Semanza* was not convicted of war crimes. This was the result of the Separate and Dissenting Opinion of Judge Dolence, who did not want to enter a conviction on

79. *Semanza* Judgement, *supra* note 5, para. 518.

80. *Ibid.*, para. 518.

81. *Ibid.*, paras. 519, 521.

82. *Akayesu* Judgement, *supra* note 2, para. 127.

83. *Ibid.*, para. 128.

84. *Semanza* Judgement, *supra* note 5, Separate Opinion of Judge Ostrovsky, paras. 31–32.

the counts of war crimes because of the apparent concurrence of these crimes with convictions for genocide and crimes against humanity.

3.3. The *Rutaganda* Appeal Judgement

In the case of *Rutaganda*, the trial chamber had established that there was no link between Rutaganda's acts and the armed conflict. The prosecution, however, maintained that this finding amounted to an error of fact.⁸⁵ It argued that on the basis of the evidence no tribunal could have come to the conclusion that no link to the armed conflict existed.⁸⁶ In so doing, the prosecution pointed to the testimonies of expert witnesses, Xavier Nsanzuwera and Filip Reyntjens, demonstrating – at least according to the prosecution – that there were relations between the *Interahamwe* on the one hand and the Rwandese Army (FAR) and the National Gendarmerie on the other. Moreover, it held that the perpetrators of the massacres had committed their acts with the view that the Tutsi were accomplices of the RPF, the enemy.⁸⁷ According to the prosecution there was proof of (i) a link between Rutaganda, as second vice-president of the *Interahamwe*, and one of the parties of the armed conflict; and (ii) of a general link between the massacres committed by the *Interahamwe* and the armed conflict. It therefore argued that the trial chamber should have concluded that the nexus requirement had been fulfilled.

The Appeals Chamber agreed with the prosecution's view. It noted that in particular the authoritative role that the FAR had played vis-à-vis the *Interahamwe* during the massacres was a strong indication that a link with the armed conflict existed.⁸⁸ The Appeals Chamber acknowledged its omission so far to define the nexus requirement. Consequently it quoted the *Kunarac* criterion:

What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict. The Trial Chamber's finding on that point is unimpeachable.

In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, inter alia, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties.⁸⁹

85. *Rutaganda* Appeal Judgement, *supra* note 3, para. 560.

86. *Ibid.*, para. 574.

87. *Ibid.*, paras. 562–563.

88. *Ibid.*, paras. 575–580, esp. 579.

89. *Kunarac* Appeal Judgement, *supra* note 78, paras. 58–59.

The ICTR Appeals Chamber endorsed this criterion with two clarifications.⁹⁰ First, it understood the words ‘under the guise of the armed conflict’ not to mean ‘at the same time as the conflict’, or ‘in all circumstances created by the armed conflict’. Not every crime committed during a situation of armed conflict constitutes a war crime. Second, it held that the determination whether a link exists cannot be based on the existence of one of the elements mentioned in the *Kunarac* Appeal Judgement. Instead, several of the elements should be considered, and the determination should be made even more cautiously in the case where the perpetrator is a non-combatant.

In the Appeals Chamber’s view, the above did not constitute a new interpretation of the nexus requirement, but it was rather a clarification of the requirement as already used by the trial chamber in the *Rutaganda* Judgement in first instance.⁹¹ The difference between the two trial chambers concerns the *application* of this standard to the facts proved. The Appeals Chamber convicted Rutaganda of war crimes on appeal.⁹²

3.4. The *Cyangugu* Judgement

Only one of the accused in the *Cyangugu* case, Imanishimwe, was convicted for war crimes. The other two accused, the former Minister of Transport, Ntagerura, and the former prefect of Cyangugu, Bagambiki, were acquitted on all counts due to lack of evidence⁹³ and vague charges.

In the case against Imanishimwe the chamber found that the accused could be held responsible for war crimes on the basis of several distinct acts. Some of these acts concerned crimes against identified persons or a specific number of persons who were suspected to be associated with the RPF. Moreover, the massacre of Tutsi civilians at a football field was found to be carried out under the guise of the armed conflict.⁹⁴

The fact that there was no armed conflict taking place in Cyangugu was not considered relevant.⁹⁵ Once common Article 3 of the Geneva Conventions applies, its coverage extends to the whole territory. What about crimes committed far from the battlefield? Is the mere pretext that all Tutsi are the enemy sufficient to establish such a link? The question that arises then is whether the mere pretext that all Tutsi are the enemy suffices to establish such a link. The current case law appears to answer this question in the affirmative. On the other hand, the trial chamber felt the need to distinguish between two types of attacks, ‘the attack against the civilian Tutsi population of Cyangugu’, and ‘a related systematic attack on political grounds

90. *Rutaganda* Appeal Judgement, *supra* note 3, para. 570.

91. *Ibid.*, paras. 571–572.

92. Dissenting and separate opinions attached to the judgement reflect the discussion between the judges whether such reversal of an acquittal by the Appeals Chamber without any additional possibility for appeal was allowed.

93. In a Dissenting Opinion, Judge Williams found that there was sufficient evidence to convict Bagambiki for crimes against humanity and war crimes.

94. *Cyangugu* Judgement, *supra* note 10, paras. 784–793, 802–803.

95. Bagambiki, the former prefect of Cyangugu, stated that ‘no weapons were distributed in Cyangugu because it was not close to the active front’, *ibid.*, para. 207.

against civilians with suspected ties to the RPF'.⁹⁶ This appears to support the view expressed for the first time in the *Akayesu* case that the war between the RPF and the FAR and the genocide were two different events.

3.5. Assessment

War crimes as a category of crimes are often considered the lesser of the three crimes within the jurisdiction of the ICTR. Nevertheless, the above illustrates that a proper interpretation of the elements of this crime goes to the very core of qualifying the situation in Rwanda as a whole. The ICTR Appeals Chamber, however, seemed reluctant to make a general observation on the character of the Rwandan situation. Instead, it relied on a legal standard developed in ICTY law supporting the legal practice of assessing a link on a case-by-case basis. In the *Rutaganda* case the Appeals Chamber applied the legal standard somewhat differently from the trial chamber.

The Appeals Chamber confirmed the trend begun in the *Akayesu* Appeal Judgement to apply the nexus requirement less stringently.⁹⁷ Despite its acquittal on war crimes, the majority opinion of the *Semanza* Judgement concerning the nexus requirement fits well with this development, and in some ways it even anticipated the *Rutaganda* Appeal Judgement. In the *Cyangugu* case war crimes had been committed against persons who were selected for their suspected ties with the RPF. In these situations there may be a stronger case for determining that a link to the armed conflict existed than in cases of massacres of Tutsi civilians hiding in churches, under the pretext that they were the enemy. Such massacres can more appropriately be qualified as genocide and not additionally as war crimes.

The less strict 'linkage requirement' applied in these recent ICTR cases may be welcomed. After all, it may be seen to be more in line with the view that once common Article 3 is applicable, its application extends to the whole territory and is not confined to the theatre of combat. On the other hand, this interpretation may be regarded as accommodating government propaganda during the genocide that all Tutsi were the enemy. This, needless to say, would be an undesirable inference.

In the *Kamuhanda* case, the linkage requirement was applied more strictly than in the *Semanza* case. In the former the trial chamber held that

The Prosecution has not shown sufficiently how and in what capacity the Accused supported the Government effort against the RPF. No convincing evidence has been presented to demonstrate that the Accused, either in a private capacity or in his role as a civil servant, worked with the military, actively supported the war effort or that the Accused's actions were closely related to the hostilities or committed in conjunction with the armed conflict.⁹⁸

In sum, no general conclusions can be drawn from the ICTR case law on the nexus requirement.

96. *Ibid.*, paras. 707–708.

97. For some critical remarks on this development, see F. Mégret, *Le Tribunal pénal international pour le Rwanda*, Perspectives Internationales No. 23 (2002), 194–5, esp. also n. 688.

98. *Kamuhanda* Judgement, *supra* note 9, para. 741.

The Elements of Crimes annexed to the Statute of the International Criminal Court (ICC) define the linkage required for war crimes as follows: the conduct must have taken place in the context of and in association with an armed conflict.⁹⁹ This is not particularly helpful either, and, like the ICTR, the ICC will have to decide on a case-by-case basis whether a link exists.

A critical analysis of ICTR case law with regard to war crimes reveals that the Tribunal has so far failed to provide a better insight into the legal qualification and the interrelationship of the events that took place in Rwanda in 1994. Its inconsistent case law makes a much-required assessment of the conflict, and of the role of the parties to it, impossible.

4. FINAL COMMENT

This analysis of ICTR case law may illustrate the nature of the cases and the type of legal problems the ICTR has to face. The main task of the ICTR is to prosecute and try individuals properly, that is, in accordance with fair trial requirements. One of the great challenges the Tribunal faces in this respect is to establish the facts adequately and accurately. With the passing of time this may turn into an increasingly precarious undertaking, since the Tribunal relies to a very large extent on eyewitnesses and oral testimony. Against this background the importance and complexity of drafting specific indictments becomes obvious. Fair trial requirements imply a strict application of the rule that indictments must contain a precise statement of the facts.

It is not only with regard to procedural matters that the ICTR should further develop and clarify its law. Also on substantive issues of law, it should take up the challenge of streamlining and specifying its output. The issues discussed in this paper are just a few of the matters that require further development.¹⁰⁰

The trial chamber in *Semanza* has made important contributions to clarifying the law. The findings in this judgement may be welcomed and stand in stark contrast to the relatively superficial findings in the *Ntakirutimana* and *Niyitegeka* judgements. While establishing the facts correctly is of prime importance it is nevertheless equally important to have well-reasoned judgements, not least to avoid overburdening the ICTR Appeals Chamber by referring difficult questions to the appellate phase. Hence the increased pace of delivering judgements at the ICTR may be applauded, but at the same time the judgements themselves must be critically appraised. Every trial chamber must continue to take proper cognizance of the quality of their jurisprudential output.

99. See the penultimate element of each war crime, Elements of Crimes, annexed to the ICC Statute, 2 Nov. 2000, PCNICC/2000/1.

100. Other notable issues arising from these judgements concern the findings on extermination, murder, and rape as crimes against humanity.